No. 487

Supreme Court of the United States

October Term—1944.

JOSEPH T. WATERS,

Petitioner,

AGAINST

KINGS COUNTY TRUST COMPANY,

Respondent.

Petition, Brief and Appendix in Support of Application for Writ.

SIDNEY S. BOBBÉ,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM—1944.

JOSEPH T. WATERS,
Petitioner,

AGAINST

KINGS COUNTY TRUST COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Joseph T. Waters respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Petitioner seeks to review a judgment dismissing his complaint after verdict in an action to recover $25,000.00 damages for breach of contract of employment as a broker. Jurisdiction was based on diversity of citizenship.

The principal issue contested upon the trial related to petitioner's claim that he was employed as a broker for the purpose of finding a purchaser of the stock of Red Star Towing & Transportation Company (and an affiliated dry-dock company) of which respondent, as a trustee of two estates, was the principal stockholder (pp. 289, 308).

Respondent, in support of its contentions that it did not thus employ petitioner, introduced in evidence (p. 147), over objection (pp. 146-149) its own diary of transactions affecting said estates, covering a period of over four months (Deft's Exh. A, pp. 318-345). Petitioner contends that this diary was a self-serving instrument, the most damaging of whose entries were made at the very time when a possible claim by petitioner was contemplated; that it was not admissible as a business record under the Business Records Act (28 USCA, §695),* and that its admission in evidence violated the principles enunciated by this Court in *Palmer* v. *Hoffman,* 318 U. S. 109.

This exhibit consisted of separate, typewritten sheets of legal cap, which were kept in the folder of the estate (605). The contents had been dictated either by Mr. Lambrecht, the respondent's trust officer, or by Mr. Allen, its Vice-President, both of whom had conducted the negotiations with petitioner (fol. 440). After being typed, it was subsequently corrected and edited by the insertion of marginal notes and interlineations (pp. 148-9). Although it is dated chronologically, there are many gaps in the entries, and some of the conceded transactions that took place with the petitioner, and that became important upon the trial, were entirely omitted (fols. 437, 471-2, 503, 626-7, 695-8).

Except for a few limited matters, such as the submission of an account to the court, the decree of the court, etc., which were strictly required to be placed in the diary or history sheet, the man in charge of the estate was supposed to put in only what he himself regarded as "important", and he was supposed to "boil down" the important things, as his "discretion" and care would dictate (fols. 435, 437, 503, 697-8). The entries particularly objected to were written at the very time when the respondent was fearful that the petitioner might assert a

*See Appendix.

claim for commissions, as will appear from some of the entries themselves (fols. 1008-1010, 1017).

It is petitioner's claim that the diary as a whole was highly damaging. However, to keep this petition within limits, only two of the most prejudicial entries will be discussed, *i. e.* those of March 5th and 6th, 1941. On March 3rd petitioner procured an offer to pay $485,000 cash from his customer, Newtown Creek Towing Corporation (pp. 99-100, 172, 193), and respondent received, on March 4th, an offer from one Sanders, the President of the Red Star Company, who was concededly acting as a dummy for a third party (p. 183) to purchase at ostensibly the same price (p. 336). On March 5th, Mr. Lambrecht and Mr. Allen consulted the Bank's attorneys, Messrs. Schmid and Tobias, of Wrenn & Schmid, with reference to a possible liability to petitioner herein if a sale was made to Sanders, instead of to the Newtown Creek Company, and the following entry was made in this diary, Exhibit A (pp. 336-7):

> "Mar. 5. Mr. Allen, Mr. Schmid, Mr. Tobias and Mr. Lambrecht met today and discussed the possible effect of the offers of Newtown Creek Towing Company and Mr. Sanders for the Red Star and College Point companies and our liability with respect to commissions and the payment of bonus to employees, etc. At the conclusion of the conference, Messrs. Wrenn & Schmid advised that, in their opinion, they believe the executors may reject the offer of the Newtown Creek Towing Company and accept the offer of Mr. Sanders without incurring any liability for brokerage to the broker who represented the Newtown Creek Towing Company. This advice was given after reading our correspondence on the matter and detailed oral report of Mr. Allen and Mr. Lambrecht."

In addition to the objection made to the diary as a whole, as self-serving, this particular entry was objected to (pp. 148-9, fols. 442, 446), but the Court ruled—erroneously, as petitioner will show in his brief—that the entry was proper as showing that respondent acted in good faith, having taken the advice of counsel (fol. 447).

The entry of March 6th was equally damaging, particularly that portion which refers to a conversation which allegedly occurred with petitioner's attorney, Mr. Ives (p. 339; fol. 1017):

> "I reiterated we had not engaged anybody to negotiate a sale of our stock of the Red Star and College Point companies, and that from the very beginning, I had so indicated to Mr. Waters, and that he represents the buyer and not the Trust Company *et al.* as agent, broker or otherwise."

These entries, if believed by a jury, were irreparably prejudicial to the petitioner's claim of employment.

The learned Circuit Court of Appeals has sustained the admissibility of the record on the untenable and wholly unprecedented ground that the business of a corporate trustee justifies the establishment of a practice of keeping detailed records of day by day events affecting its trusts, and that records so kept are made "in the regular course of business", and admissible under the Business Records Act—which ruling it did not consider inconsistent with that made by this Court in the case of *Palmer* v. *Hoffman, supra* (p. 356).

Because the diary was held admissible as a business record, the Court did not pass upon respondent's contention that petitioner had opened the door to its use for explanatory purposes by introducing in evidence Exhibit 12, a history sheet dated February 18th, 1941 (adm. p. 81; pp. 294, 323-8). Nevertheless, the annexed brief will show that that contention is untenable. For the purposes of

this petition it is sufficient to point out that there is not a word contained in Exhibit A that in any sense explains or qualifies the admissions made by the respondent more than two weeks earlier in Exhibit 12, and particularly is this so with reference to the entries of March 5th and March 6th, which are so highly prejudicial; nor was Exhibit 12 a part of Exhibit A; nor was the latter offered or admitted for the purpose of explaining or qualifying Exhibit 12. Yet if admissible at all, it could only have been admitted to explain and not as it was admitted, as independent evidence.

The petitioner also contended in the courts below that in accordance with the adjudicated law of New York, he was entitled to a directed verdict, since he had conclusively established both his employment and his performance. The Circuit Court of Appeals, in overruling this contention, held that a question of fact existed as to whether petitioner was employed as a broker or was merely invited to submit offers. Yet, as appears from the annexed brief, this distinction, according to the New York appellate courts, is a distinction without a difference, since it has been held that an invitation to a broker, to submit offers, in itself constitutes employment. As a matter of fact, Mr. Allen, respondent's Vice-President, admitted that he went further than merely to invite the submission of offers, having expressly authorized the petitioner to attempt to find a purchaser for the stock (pp. 199-200, fols. 596-9). Therefore it is petitioner's contention that in denying the motion for a directed verdict, the courts below have disregarded the controlling law of New York.

B.

Jurisdiction.

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code (28 USCA, §347[a]).

C.

The Questions Presented.

1. Was Defendant's Exhibit A properly admissible as a business record, pursuant to 28 USCA, §695*, and if so, does that necessarily make all entries therein admissible, even though they are hearsay, irrelevant and incompetent?

2. Was not the proof such that the plaintiff was entitled, under the established law of New York, to a directed verdict?

D.

The Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of Federal law, interpreting a Federal Statute of importance, probably in conflict with an applicable decision of this Court, although the precise question has not been, but should be, settled by this Court. The decision of this Court in *Palmer* v. *Hoffman,* 318 U. S. 109 (affg. 129 Fed. 2d 976, C. C. A. 2) clearly excludes the possibility of admitting a diary kept, maintained and prepared, as this one was, not for the systematic conduct of the respondent's business as a business, but for convenience in meeting claims; a diary prepared moreover, in the immediate shadow of such a claim, by a person interested in the negotiations, who was authorized, in making the entries, to give his own interpretation, to make his own selection of events and conversations, to boil down those things which he himself considered important, and to discard the rest, guided only by his own discretion and care.

*See Appendix.

If the *Palmer* case cannot be construed as directly in point because it involved not a diary but a sworn report made by an employee in the regular course of business, then it is respectfully urged that a review should still be granted, since this decision, for the first time in judicial history, so far as petitioner can find, opens the door to the free use by parties of their own diaries, even though they are prepared by self-interested corporate trustees and similar institutions, under circumstances in which self-interest would transcend any passion for accuracy. "Such a major change, which opens wide the door to avoidance of cross-examination" (per Douglas, *J.*, at 318 U. S. 113), should not be accomplished without the full stamp of approval of this Court.

2. The Circuit Court of Appeals has rendered a decision in conflict with a decision of the Fifth Circuit, which has held that even where a record is properly admissible as a business record, that does not *ipso facto* make all entires therein contained properly admissible if otherwise objectionable (*Lykes Brothers S. S. Co.* v. *Grubaugh*, 128 Fed. 2d 387, 390). In that case the Fifth Circuit held, per Hutcheson, *J.*, that although a hospital record was generally admissible as a business record, that did not permit the use in such record of an opinion not amounting to a diagnosis. The entry of March 5th in Exhibit A gives the opinion of counsel, allegedly rendered to respondent, which was specifically objected to (p. 149), and the diary as a whole contains hearsay, irrelevant and incompetent entries, which were also objected to (p. 148). The opinion herein ignores petitioner's contentions with respect thereto.

3. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. In holding that it was proper to deny a motion for a directed verdict because

there was an issue of fact as to whether the plaintiff was employed or merely invited "to submit offers", the opinion ignores the fact that it had already been held in New York, whose law was applicable, that a mere invitation "to submit offers" constitutes employment (*Shapiro* v. *Greenwich Savings Bank,* 266 App. Div. 359, unanimously affirmed without opinion, 293 N. Y. ..... The affirmance by the Court of Appeals was called to the attention of the Circuit Court of Appeals by the petition for rehearing, which was denied (pp. 358, 367). The undisputed evidence given by respondent's Vice-President that he expressly authorized petitioner to attempt to find a purchaser for the stock went much further than the evidence which was held sufficient to constitute employment in the *Shapiro* case.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 329, October Term, 1943, *Joseph T. Waters, Plaintiff-Appellant,* against *Kings County Trust Company and William Howard Barber, Defendant-Appellees,* and that said judgment of the United States Circuit Court of Appeals for the Second Circuit may be reviewed by this honorable Court, and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem meet and just.

Dated, New York, September 14th, 1944.

JOSEPH T. WATERS,

By SIDNEY S. BOBBÉ,
Counsel for Petitioner

BRIEF IN SUPPORT OF APPLICATION FOR WRIT.

Opinion in the Court Below.

There was no opinion in the District Court, and the opinion in the Circuit Court of Appeals has not yet been reported, but appears at page 351.

Jurisdiction.

The jurisdiction of this Court is invoked under §240 (a) of the Judicial Code (28 U. S. C. A., §347 [a]). The order for mandate herein was entered on the 23rd day of August, 1944 (p. 370).

Statement of the Case.

This has been set forth in the foregoing petition.

Specification of Errors.

1. The Court erred in admitting in evidence the diary Defendant's Exhibit A.

2. The Court erred in refusing to direct a verdict in favor of petitioner.

Summary of Argument.

I.

Defendant's Exhibit A is a self-serving document, not properly admissible as a business record under 28 U. S. C. A. §695* and its admission was highly prejudicial to the petitioner.

*See Appendix.

II.

The undisputed evidence, in accordance with the adjudications of New York appellate courts, establishes plaintiff's employment as a matter of law, and a verdict should have been directed for the petitioner.

POINT I.

Defendant's Exhibit A is a self-serving document, not properly admissible as a business record under 28 U. S. C. A. §695, and its admission was highly prejudicial to the petitioner.

This exhibit (pp. 318-345) consisting of a diary in narrative style, composed partly by Mr. Lambrecht and partly by Mr. Allen (fol. 440), was destitute of every characteristic of a record kept in the "regular course of business", as such phrase was defined by this Court in *Palmer* v. *Hoffman*, 318 U. S. 109, and by the Second Circuit in the same case (129 Fed. 2d 976, 983).

The admissibility of business records depends, according to Mr. Justice Douglas (318 U. S. 114), upon

> "the probability of trustworthiness of records because they were written reflections of the day by day operations of a business"

and upon

> "the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation."

In refusing to interpret the Act so as to apply it to a "regular course" of conduct which may have some relationship to business, this Court further said:

"We cannot so completely empty the words of the Act of their historic meanings."

Yet the diary here before us cannot properly be described as a written reflection of the day by day operations of the business, and in any event is so highly motivated that there is lacking every "probability of trustworthiness" and every "earmark of reliability", for it was polluted at the source by Lambrecht's bias and his knowledge when he made the entries of March 5th and 6th that litigation might be imminent. This knowledge would naturally overpower whatever motive for accuracy he might otherwise have had—a determining consideration (see Judge Frank's opinion in the *Palmer* case, 129 F. 2d 976; 5 Wigmore Evid. §1522). The diary was admittedly inaccurate (pp. 158, 159, 168) and incomplete (pp. 157, 209, 232-3), and it was admittedly prepared only as the discretion and carefulness of Lambrecht and Allen would dictate (p. 233, fol. 698) Lambrecht admitted that he would have written his February 18th report differently if he had known then that they were going to have a lawsuit (p. 159, fol. 475). It was in no sense a mere objective, mechanical "reflection" of the day by day transactions of a business. It had every earmark of unreliability and untruthworthiness. It was not a record made "in the regular course of business".

Lambrecht's bias was strong, for respondent was obviously anxious to sell the stock to Sanders, its depositor (p. 193) and its friend of a good many years' standing (pp. 245-6). The Red Star Company was also a depositor, with respondent and its deposits had increased after the sale, while Sanders continued as President from an average of $10,000 to an average of $165,000 (p. 237, fol. 709). Naturally, respondent would want to justify a sale to Sanders without liability to petitioner. Therefore, when Lambrecht made his entries of March 5th and March 6th,

can it possibily be said that he was a mere distinterested amanuensis, overpoweringly inclined to accuracy; or was he not powerfully motivated to make as good a record as possible, both for the Bank and for himself? The prospect of imminent litigation was present in his mind sufficiently to cause him and Allen to consult counsel as to whether or not such litigation could succeed. His hope and belief that it would not succeed, necessarily colored and affected the entries he subsequently made.

The Circuit Court of Appeals, in its opinion, cites no authority, and indeed none can be found, to sustain the admissibility of such a diary. It merely compared this case with cases involving the admissibility of hospital records (p. 356). But when the *Palmer* case was before that Court, Judge Frank distinguished hospital records from the record there involved by saying, at 129 Fed. 2d 992, that the former are "ordinarily not made by persons with impelling motives to misrepresent." In fact, in no case cited by the Court below was the hospital whose record was used itself a party to the litigation.

The Court below also overlooked the inferential condemnation by this Court in the *Palmer* case, at 318 U. S. 113, of the use of diaries, for Mr. Justice Douglas, in his opinion, in speaking of the possible use of a lawyer's diary in the event that the bars were let down, said:

> "We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify its reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such."

Those words fit this case exactly.

The Supreme Court of New York has refused to permit the use as evidence of a lawyer's regularly kept diary (*Hughes* v. *Eastern Contracting Co.*, 164 Misc. 318, Approved, 264 App. Div. 573).

The entries of March 5th and 6th were not even the type of entries which, according to respondent's own rules, "must be" made by the man in charge of the estate, for he was only *obliged* to enter such things as the rendering of an account, the decree of a court, the consent to the sale of securities by beneficiaries, etc. (pp. 232-3). The entries of March 5th and 6th, therefore, cannot possibly be said to have been made as a part of a method "systematically employed for the conduct of a business as a business", any more than the keeping of a record of accidents was a record of the railroad business as such in the *Palmer* case.

However, assuming that the record is admissible as a business record, that does not open the door to the use of that record as a means of presenting testimony which would be inadmissible if testified to by a living witness (*Lykes Brothers Steamship Co.* v. *Grubaugh* [5 Cir. 1942] 128 Fed. 2d 387, 390; *Freedman* v. *Mutual Life Insurance Co.*, 342 Pa. 404, 414; *People* v. *Kohlmeyer*, 284 N. Y. 366; *Roberto* v. *Nielson*, 288 N. Y. 581; *Constantinides* v. *Manhattan Transit Co.*, 264 App. Div. 147).

In the *Lykes Brothers* case, the Court said, per Hutcheson, *C. J.*:

> "The conclusion in the hospital report that plaintiff was fit for work was properly excluded. The Statute making such reports evidence merely accredits the facts that they contain, it does not purport to make opinions admissible as evidence."

Thus, Lambrecht could not have testified to a conference with the Bank's attorneys, or as to his conclu-

sions; as to what he told them or what they said to him,—all in the absence of petitioner. Not even the attorneys themselves could have testified to the giving of an opinion to their client concerning the petitioner's right to recover compensation for his services. Yet in spite of specific objections (fols. 441-2, 446-7), this record, containing such objectionable evidence, was allowed to be read to the jury.

Advice of counsel is never a defense in a civil action, except where want of probable cause is an essential part of the cause of action; and even then, it must first be proved that the advice was given after a full and fair statement of the facts (38 C. J. 427, *et seq.;* 18 R. C. L. 45, *et seq.; Lathrop* v. *Mathers*, 143 App. Div. 376, 380).

The prejudice caused by the entries is self-evident. In both entries, there are statements which, if believed by the jury, would show that the petitioner was never employed, and that he so understood. The March 5th entry also reinforces respondent's claim with the opinion supposedly given by its counsel. By these entries, prepared with this background, respondent was permitted to make itself both judge and jury in its own cause, and to destroy plaintiff's right through the instrumentality of its own privately prepared memorandum.

As to respondent's claim that the door was opened to the introduction of this diary by reason of plaintiff's introduction of Exhibit 12, it should be sufficient to say that the learned Circuit Court of Appeals did not pass upon that contention, because it considered it unnecessary in view of its determination that Exhibit A was admissible as a business record. However, the contention that the door was opened is wholly without merit. Exhibit 12 is dated February 18th, long before the entries in question, and it was a separate, integral paper (p. 294). So far as the plaintiff knew, when he offered it in evidence, it was

not even related to Defendant's Exhibit A. It was not a physical part of it, although it so happened that a copy of it was made and inserted in Exhibit A; but even that copy varies in that it contains marginal notes missing from the original (pp. 294, 326-7).

When Defendant's Exhibit A was offered in evidence, it was not offered for the purpose of explaining or qualifying Exhibit 12, but solely as a paper admissible under the Business Records Act (p. 146, fols. 437-8). There is not a single respect in which Exhibit A can be said to explain or qualify the language of Exhibit 12, and it would be strange, indeed, if entries made March 5th and 6th could serve such a function with respect to a record made more than two weeks earlier. It would open the door to the avoidance of any damaging admission by a retraction made subsequently.

Exhibit 12 purported to be merely an analysis of an offer made by Newtown Creek which had been rejected by respondent long before March 3rd (pp. 285-7), and in no sense could the later entries, relating to entirely different offers, be explanatory of the earlier. For instance, the advice of counsel, received on March 5th, could hardly be deemed explanatory of language used by Lambrecht on February 18th.

It is true that a party may avail himself of other statements made by him "at the same time", tending to destroy or modify the use which might otherwise be made of his admissions (*Rouse* v. *Whited*, 25 N. Y. 170, 175), but even where part of an utterance has been put in evidence, and the remainder of that same utterance is offered, "No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable"; "No utterance irrelevant to the issue is receivable"; and "The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony" (*People* v. *Schlessel*, 196 N. Y. 576, 481; 7 Wigmore, *Evidence*, §2113).

The entries of March 5th and 6th would certainly fail to qualify on any of the three grounds thus enumerated.

The decision sought to be reviewed exalts corporate trustees into a class apart, and gives them the right—surely not possessed by their beneficiaries or the attorneys of the beneficiaries, or by any other class of person—to record in diary form their interpretations and versions of transactions, even though claims against them based thereon may be imminent. It permits them, in such form, to record transactions occurring in the absence of the beneficiaries, and not subject even to contradiction. It permits them to enter opinions rendered, or allegedly rendered, justifying their conduct as trustees; and all of this they are entitled later to present to a court of law as evidence, and what is more, as evidence not subject to cross-examination. If that is to be the law, it marks a radical and historic break with the past, for to deprive a party of his right to cross-examination is to deprive him of what has been recognized as the greatest single safeguard of the truth, and perhaps the greatest single contribution that the English common law has made to the administration of justice (5 Wigmore, *Evidence*, §1367).

It is not surprising that this decision is wholly without precedent in the entire field of the law, so far as the writer can discover. If it is to be approved by this court, it should only be done after solemn consideration and a full hearing on the merits.

POINT II.

The undisputed evidence, in accordance with the adjudications of the New York appellate courts, establishes plaintiff's employment as a matter of law, and a verdict should have been directed for the petitioner.

On this point the opinion says (pp. 352-3):

> "There was plainly an issue of fact whether the plaintiff was employed by the Bank to sell stock (which it owned as trustee for two estates) or whether it merely told him in effect that it would consider any offer he might submit."

The Court of Appeals of the State of New York has held, that a mere request to a broker to "submit offers" is proof of employment, in affirming without opinion, on July 20th, 1944 (293 N. Y. .....) *Shapiro* v. *Greenwich Savings Bank,* 266 App. Div. 359. That decision is in accord with well-established principles of law, to the effect that where a broker acts with the consent of the principal, or where the principal accepts the labor of the broker, that constitutes employment (9 C. J. 516; *Sibbald* v. *Bethlehem Iron Co.,* 83 N. Y. 378, 379). Since respondent's vice-president, Allen, admitted that he expressly authorized the petitioner to attempt to find a purchaser (pp. 199-200), employment was established as a matter of law. Yet the courts below have construed these admitted facts as the opposite of employment.

If this petition is granted by this Court, it will be shown, as it was below, that performance was also conclusively established. Evidently the Circuit Court was satisfied on this score, since the issue of employment was the only one mentioned by it as presenting a jury question (p. 353).

Petitioner's employment was in no way affected or impaired by the circumstance that he was to receive his compensation from the purchaser, for it is recognized that under those circumstances there is double employment (*Grossman* v. *Herman*, 266 N. Y. 249, 252; *Atkinson* v. *Pack*, 114 N. C. 497, 604); and the seller is liable in damages for the amount of commissions that the broker was prevented from earning by the failure of the seller to complete the sale (8 *Am. Jur.* 1072; *Aronson* v. *Carobine*, 129 Misc. 800; *Pease & Elliman Co.* v. *Gladwin Realty Co.*, 216 App. Div. 421; *T. C. Henry & Sons Co.* v. *Colorado Farm Co.*, 8 Cir., 164 Fed. 986, 988; *Charles K. Byrd & Co.* v. *The Age-Herald Publishing Co.*, 219 Ala. 505).

CONCLUSION.

It is respectfully submitted that the petition for a writ should be granted.

SIDNEY S. BOBBÉ,
Counsel for Petitioner.

APPENDIX.

28 USCA §695.

WRITINGS AND RECORDS MADE IN REGULAR COURSE OF BUSINESS.

§695. *Admissibility.*

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind. (*June 20, 1936, c. 640, §1,* 49 Stat.)

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LOUIS J. CASTELLANO,
Counsel for Respondent.

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Statement

The Circuit Court unanimously affirmed on August 23, 1944 (p. 370) a judgment of the United States District Court for the Eastern District of New York, entered on November 4, 1943, in favor of defendant, dismissing plaintiff's amended complaint upon the merits (267-269). The judgment was rendered upon the unanimous verdict of a jury against the plaintiff, after a five (5) day trial before Judge Campbell and a jury (266, 268). In a previous five (5) day trial of the action before Judge Inch and a jury, the jury disagreed (273, 275, 276).

The plaintiff now seeks a further review by this Court, claiming that there was error in the admission of certain evidence and that, as matter of law, a verdict should have been directed in his favor. Each of these questions was carefully reviewed by the Circuit Court, and the rulings of the District Court unanimously affirmed (352-356). Moreover, the plaintiff applied *ex parte* to the Circuit Court

for a rehearing, elaborating on these two claimed errors, but the application was denied (358-368). It is respectfully submitted that the pertinent facts, which will be discussed under the appropriate points, clearly show that there is no important law question involved warranting a further review by this Court.

POINT I

Defendant's Exhibit A was properly received in evidence.

The trial judge ruled that defendant's Exhibit A (147, 318) was admissible in evidence under 28 U. S. C. A., sec. 695, as a writing or record made in the regular course of business (145-149). The Circuit Court agreed, holding "that the business of a corporate trustee justifies the establishment of a practice of keeping detailed records of day by day events affecting its trusts, and that records so kept are made 'in the regular course of business.'" The Circuit Court unanimously decided that the ruling was not in conflict with *Palmer* v. *Hoffman*, 318 U. S. 109 (356).

The petitioner fails to state the record facts which justify the ruling of the Courts below. These facts demonstrate that defendant's Exhibit A, which was the bank's history sheet or diary relating to the William E. Barber Estate and the Hendrickson Trust, was not prepared in anticipation of litigation, as plaintiff contends, but that such records were always prepared and used by the bank in all estates and trusts administered by it and were actually necessary for the proper administration of its trust business. The business of the bank in its trust department could not be carried on without such records. Failure to keep such records in the performance of its trust duties would lead to all sorts of difficulties, and probably result in severe censure of the bank by the courts in which it is called upon to account.

As Allen, the vice-president of the bank explained, the bank had no one with the title of Trust Officer, but that he was in charge of the trust end of the banking business. Over him were the bank's Trust Committee and Executive Committee to which he reported and made recommendations. Under his immediate supervision were six men, among whom all of the trust work was divided. Lambrecht, a clerk in the Trust Department, was one of these six men. He was in direct charge of a number of accounts and "it was his duty to know the particular provisions of the instrument that created those accounts, to know the people and to know what we could do, what they wanted to be done, and in any case negotiations were carried on by him and he would bring them" to Allen who, in turn, reported to the Trust Committee or to the Executive Committee (196-198).

The final decisions of the bank were not made by Lambrecht or by Allen but by the Trust or Executive Committee. These decisions were incorporated in the minutes of the committees, several of which were offered in evidence by the petitioner (81, 292, 86, 315, 316, 177, 317). A comparison of such committee minutes with the bank's history sheet, prepared by Lambrecht and supplemented by Allen (161, 162, 202, 203), show how the history sheet was employed as the basis of the committees' discussions and decisions.

The plaintiff's brief assails the trustworthiness and reliability of the bank's history sheet. However, a comparison of the entries on the history sheet with the testimony of all of the witnesses on the trial and the documentary evidence adduced, will quickly confirm the fact that the entries were made with substantial accuracy and with care. Additionally, the two men who were responsible for writing the history sheet, Lambrecht and Allen, were in court and were subjected to exhaustive cross-examination. While plaintiff is willing to vouch for the trustworthiness of that part of the history sheet which pleases him (Exhibit

12), he would repudiate all the rest as contained in Exhibit A (81, 294, 147, 318-345).

The bank's history sheet was not offered in evidence by defendant until plaintiff had first introduced a most material part of it into evidence, as part of his case, over defendant's objection, and had used it to serve his own purposes (81). So much of defendant's Exhibit A as consisted of the bank's history sheet under date of February 18, 1941, prepared by Lambrecht, was first offered in evidence by the plaintiff, as plaintiff's Exhibit 12 (admitted 81, printed as part of defendant's Exhibit A, 318-345, 294).

The obvious purpose of the plaintiff in introducing Exhibit 12 into evidence was because plaintiff believed that it contained many damaging admissions by the bank that would greatly aid plaintiff's case. The attempted analysis of the $450,000 offer made by plaintiff's prospect on February 17, 1941, made by Lambrecht, a clerk in the bank's Trust Department, with no authority whatsoever to bind the bank or its trust by making admissions (126, 195, 197, 198), was seized upon by plaintiff as containing admissions by the bank that the offer of plaintiff's prospect was for $470,000 instead of only $450,000; that plaintiff was recognized as the bank's broker; that the Smith claim to commissions was disregarded by the bank; that the price of $470,000 could be improved upon; that a sale on the proposed terms would be of great advantage to the stockholders; and that the analysis contained other claimed admissions against the bank's interest (324-328).

These alleged admissions went to the very heart of the case; they involved the most important issues that were submitted to the jury (253-262). Certainly, under these circumstances, the defendant had the right to offer in evidence the rest of the history sheet in order that the jury might have the benefit of the whole story, particularly with respect to the bank's official attitude concerning Lambrecht's claimed admissions. For where part of a writing has been received in evidence as containing admissions, the

party against whom it is offered has the right to introduce the remainder of the writing to explain or qualify the alleged admissions or to modify or destroy their effect (*Rouse* v. *Whited*, 25 N. Y. 170; *Platner* v. *Platner*, 78 N. Y. 90; *Grattan* v. *Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Fleischman* v. *Toplitz*, 134 N. Y. 349).

The plaintiff's claim that Exhibit A was not offered for the purpose of explaining or qualifying the alleged admissions, contained in Exhibit 12, is without substance. The defendant simply offered the record in evidence, and the trial court admitted it (146, 147). Defendant's counsel was not asked to state the purpose of the offer. In order for the jury to decide what importance should be attached to the alleged admissions of the bank's clerk, Lambrecht, contained in Exhibit 12, it was necessary and important to put that record in its proper setting as an integral part of the entire history sheet, Exhibit A. Only in that way could the jury fairly determine what the officials of the bank admitted and what they did not admit with respect to plaintiff's claim.

Although plaintiff introduced part of defendant's Exhibit A in evidence in presenting his own case, he objected to the rest "as containing self-serving declarations," and entries as to irrelevant and incompetent transactions (146-149). The first objection is pointless under the language of the statute; if the conditions of the statute are otherwise complied with, the writing or record is admissible even though it contains self-serving declarations (Richardson On Evidence, 5th Ed., sec. 668). The second objection called for specific objection as to particular entries before the Court could rule on them. No such objections were made. Nor was any objection made that the entries were not made in the regular course of business, as they clearly were so made (81, 145-149, 156-162, 202, 203, 232, 233). Moreover, both writings, defendant's Exhibit A and plaintiff's Exhibit 12, the latter being an integral part of the former (294), were relevant and material to the issues of fact involved

in the case. Hence, the only disputed objection is as to competency. But the plaintiff, having first introduced part of Exhibit A, certainly waived the question of competency as to the remainder of the exhibit.

Under Rule 43 (a) of the Rules of Civil Procedure, the exhibit was admissible because it would be admitted in evidence both in the State of New York (Civil Practice Act, sec. 374a), and in the federal courts (28 U. S. C., sec. 695).

The plaintiff relies on *Palmer* v. *Hoffman*, 318 U. S. 109. He claims that the ruling here is in conflict with that case. The question involved in the *Palmer* case was the admissibility in evidence of an accident report made by the engineer of a train to his employer, as part of an established routine. On the trial, the railroad offered the report in evidence. The trial court excluded it. The Circuit Court affirmed, one judge dissenting. This Court affirmed, holding that the engineer's report, although made pursuant to an established routine, was not a record made in the regular course of business within the purview of the statute. The rule was epitomized in these words:

> "In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise *as a railroad business.* Unlike payrolls, accounts receivable, accounts payable, bills of lading *and the like,* these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." (Italics ours).

This Court also explained what was intended by the words "regular course" of business, as contained in the statute:

> "But 'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

But, as pointed out above, the plaintiff did not object to Exhibit A on the trial upon the ground that it was not a record made in the regular course of business (146-149). He merely asserted that certain entries, without specifying them, were self-serving or irrelevant or incompetent. Assuming, therefore, but without conceding that plaintiff may now raise an objection not raised at the trial, the objection is without merit.

The plaintiff contends that this exhibit had nothing to do with the defendant's business as a bank or trust company. For that matter, neither was the sale of the stock the business of the bank, as such. The sale of the stock was made by the bank in its fiduciary capacity only; the record did cover the business of the Barber Estate, which was the bank's business insofar as it was a co-executor and co-trustee of that estate (3, 4, 297, 298).

The defendant here is a trust company. It is a corporate trustee, with many employees, not a one-man business. Its essential function is to act as a trustee; that is the inherent nature of its business. The avowed object and primary purpose of its creation is to properly supervise and carefully administer the trust estates committed to its care as a fiduciary (*Gause* v. *Commonwealth Trust Co.*, 196 N. Y. 134, 153).

As a trustee, certain methods are systematically employed by the bank in the conduct of its business. It conducts its operations and acts through a number of employees, officers and committees, all supervised by a board of trustees (196-198, 202, 203). Such a trustee must keep and be in a position to render periodic reports or accounts of its activities. Such reports are compulsory for the systematic conduct of the enterprise of a trustee. Trusteeing is defendant's business, and it is mandatory for a corporate trustee to keep detailed records of day by day events affecting its trusts so as to be able to properly conduct its internal affairs and come to important decisions, as well as to give an account of its stewardship, whenever called upon to do

so, not only to the courts but to the beneficiaries of the trusts and others interested, as well. A trustee's records must be kept for that definite business purpose and not primarily for the purpose of any litigation that might conceivably arise. The primary utility of defendant's Exhibit A is in carrying on its business as a trustee, not in litigating. Defendant's Exhibit A is the very kind of a record contemplated by the statute.

There appears to be no sound reason, therefore, why the business records of such a corporate trustee should not be received as evidence in chief within the purview of the statute. In any event, as has been shown, a vital part of the history sheet having been received in evidence as part of the plaintiff's case, it was entirely proper to admit the balance in order to get the whole truth before the jury.

But the petitioner now insists that at least certain parts of defendant's Exhibit A should have been excluded. He refers specifically to the entries made under date of March 5th and 6th, 1941 (336, 337, 339). The entry of March 6th was not specifically objected to; if it had been it would have been pointless. If deemed self-serving, that would affect its weight, not its admissibility. Plaintiff asserts the entry of March 5th included the advice counsel gave to the bank and that such advice is no defense to such an action as this. No such objection, however, was made at the trial. Plaintiff's counsel merely asked the Court to read an entry and give an opinion as to whether it was proper. No objection was made specifying any particular ground. The Court ruled that the entry was admissible as going "to show whether they were acting in good faith, that they had taken the advice of counsel", and the plaintiff excepted (149). The opinion of the Circuit Court is silent on this ruling; apparently it was not deemed important enough to warrant discussion.

The defendant neither pleaded nor urged advice of counsel as a defense to plaintiff's complaint. But the plaintiff did specifically charge the defendant with bad faith, arbitrariness, unfairness, deceit and fraud (6, 7). The

good faith of defendant having been thus attacked and directly put in issue, the trial judge permitted the entry to stand as bearing on the issue of good faith. Under the circumstances, this ruling was clearly proper. If it were error, it was harmless and the jury certainly was not prejudiced thereby, particularly in view of the fact that the plaintiff himself had previously offered evidence showing that as early as February 19, 1941, the bank had called upon its attorneys for advice with respect to this transaction (292). Moreover, the error, if any, was occasioned by the plaintiff's improper introduction into evidence of plaintiff's Exhibit 12 over defendant's objection (81). That exhibit should not have been received in evidence in the first instance until plaintiff had affirmatively demonstrated that Lambrecht had the power and authority to bind the bank by his admissions, which, in fact, he did not have (81, 126, 195, 197, 198). If two errors have thus been committed in the admission of evidence, surely the plaintiff who provoked the initial error has no ground for complaint.

POINT II

The issue of plaintiff's employment by the bank was properly submitted to the jury.

The simplest and quickest way of substantiating this point is to quote from the opinion of the Circuit Court (pp. 352-3), supplying the appropriate folio references to the record:

> "At the conclusion of the evidence the plaintiff moved for a directed verdict (251). He contends that denial of his motion was error and that we should grant it. Assuming that under Rule 50 (b), F. R. C. P., 28 USCA following §723 (c), and the practice sanctioned in *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, this court has power to direct

a verdict in the appellant's favor, this is not an occasion for its exercise. There was plainly an issue of fact whether the plaintiff was employed by the Bank to sell stock (which it owned as trustee for two estates) or whether it merely told him in effect that it would consider any offer he might submit. The plaintiff himself testified in an examination before trial that he sought out Mr. Allen, vice-president of the Bank, and asked 'if he would have any objection to my endeavoring to find a bidder for the stock * * *,' and that Mr. Allen refused to put a price on the stock but said 'they would be willing to entertain any bid I might bring in from a representative or responsible party' (120). After some further talk Mr. Allen referred the plaintiff to Mr. Lambrecht, an officer in the trust department of the Bank, who testified at the trial: 'I told him at that time that he was a volunteer that came in, that we didn't like to sell the stock, that it wasn't necessary, but we would be glad to do it if we got a favorable price,' and that any offer would have to be submitted to the Bank's executive or trust committee for final approval. Mr. Lambrecht refused the plaintiff's request for an exclusive agency and declined to give him any written evidence of authority to sell the stock (128-130). In the light of this testimony the plaintiff's argument that the refusal of an exclusive agency 'necessarily implies that he was to have a non-exclusive agency' is, to put it mildly, amazing. Equally futile is the argument that employment by the Bank is corroborated by its letters referring to the plaintiff as 'the broker,' e. g. exhibits 4, 12 and 17 (284, 294, 312). From this the plaintiff would draw the inference that the Bank recognized him as *its* broker, despite the fact that other letters of the Bank expressly referred to him as agent or broker of the prospective purchaser, e. g. exhibits 5, 6 and 8 (285, 286, 289), from whom, concededly, he was to receive whatever commission was to be paid him (5, 6, 283). Further reference to specific items of conflict in the evidence seems unnecessary to demonstrate that the issue of employment by the Bank was a jury question. It should also be evident from the

foregoing that the jury's verdict resolving the issue against the plaintiff cannot be upset for want of supporting evidence."

But, despite these established facts, the plaintiff still insists upon urging that a mere request to a broker to "submit offers" is proof of employment, as matter of law, citing *Shapiro* v. *Greenwich Savings Bank,* 266 A. D. 359, aff'd 293 N. Y. (July 20, 1944). All that the *Shapiro* case held was that: "There was *prima facie* proof that plaintiff, Shapiro, had been asked to submit offers and, thus, of employment" (266 A. D. 360). Unlike this case, no facts to the contrary appear in the *Shapiro* case. Here the plaintiff was told that he was a "volunteer" (128). He admitted that he was not acting as broker for the bank (43). His commissions were to be paid only by the purchaser (283). The plaintiff purported to represent his prospect and no one else. In the light of such facts, a double employment could not be inferred (*Knauss* v. *K. B. Co.,* 142 N. Y. 70, 75; *Reese* v. *Texas Co.,* 42 N. Y. S. 2nd 545, 550; *Wendt* v. *Fischer,* 243 N. Y. 439).

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS J. CASTELLANO,
Counsel for Respondent.

Supreme Court of the United States

October Term, 1944.

No. 487.

JOSEPH T. WATERS,

Petitioner,

AGAINST

KINGS COUNTY TRUST COMPANY,

Respondent.

PETITION FOR REHEARING.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SIDNEY S. BOBBÉ,
Attorney for Petitioner.

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CASES CITED.

AUTHORITIES CITED.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 487.

JOSEPH T. WATERS,

Petitioner,

AGAINST

KINGS COUNTY TRUST COMPANY,

Respondent.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph T. Waters, pursuant to Rule 33 of this court, respectfully submits this, his petition for rehearing of his application for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit in the above entitled matter, and for the vacating of the order entered on November 6th, 1944, denying said application.

Basis for the Petition for Rehearing.

This petition is made in view of an apparent conflict between the decision of the Circuit Court sought to be reviewed (now reported at 144 F. 2d, 680) and two recent decisions, which had not come to the attention of the petitioner until after the denial of the application for a writ, to wit: *New York Life Insurance Co.* v. *Taylor* (App. D. C.) 143 F. 2d, 14, 17, and *Schmeller* v. *United States,* 6 Cir., 143 F. 2d, 544, 550.

These cases are reported in the Advance Sheets issued respectively under date of August 14th and August 28th, 1944. The ruling in both cases is contrary to the ruling made below in the interpretation of 28 USCA, §695. This application, therefore, is deemed to come within the principle governing such applications, discussed in *R. Simpson & Co.* v. *Commissioner,* 321 U. S. 225, 229.

The Question Presented.

The only question argued on this application is Question No. 1 of the original petition, viz:

Was Defendant's Exhibit A properly admissible as a business record, pursuant to 28 USCA, §695, and if so, does that necessarily make all entries therein admissible, even though they are hearsay, irrelevant and incompetent?

Defendant's Exhibit A (R. 318-345) consisted of separate typewritten sheets, kept in a folder of the estate whose stock was being sold, and it was supposed to be a daily record (R. 161, 202). In form it was like a diary in narrative style, kept by Mr. Lambrecht, the man in charge of the estate, and by Mr. Allen, the Bank's vice-president. This diary, as the petitioner pointed out in the petition and brief, was highly prejudicial to the petitioner's claim that he was employed by the Bank as broker to sell the stock.

As to the claimed employment, the court below ruled that "there was plainly an issue of fact as to whether or not the plaintiff was employed * * *" (R. 352; 144 F. 2d, 681). It is petitioner's contention that the admission of this diary in evidence was highly prejudicial on this issue, and that it was inadmissible on the grounds stated at the time it was offered in evidence, to wit, as containing self-serving declarations (R. 146); and as containing records as to transactions which occurred when the plaintiff

was not present and other transactions which are wholly irrelevant and incompetent (R. 148).

There is no intention to repeat here all the facts fully set forth in the original petition and brief, but for the convenience of the court there are here repeated the two entries made in this diary which are claimed to have been particularly prejudicial to the plaintiff's contentions:

First, attention is called to the entry of March 5th, 1941, made, presumably, after Mr. Lambrecht and Mr. Allen consulted the Bank's attorneys, Messrs. Schmid and Tobias, with reference to a possible liability to petitioner if a sale of the stock were made to one Sanders, the ultimate purchaser, instead of to Newtown Creek Towing & Transportation Company, the petitioner's customer; or in other words, after the thought had entered the minds of both Lambrecht and Allen that the petitioner might have a legal claim to commissions. When that entry was about to be read to the jury (the court having previously overruled at R. 146, 148, the objections above referred to), the court's particular attention was called to the objectionable character thereof; but the court nevertheless, over exception, allowed it to be read (R. 149). That entry reads as follows:

> "Mar. 5. Mr. Allen, Mr. Schmid, Mr. Tobias and Mr. Lambrecht met today and discussed the possible effect of the offers of Newtown Creek Towing Company and Mr. Sanders for the Red Star and College Point companies and our liability with respect to commissions and the payment of bonus to employees, etc. At the conclusion of the conference, Messrs. Wrenn & Schmid advised that, in their opinion, they believe the executors may reject the offer of the Newtown Creek Towing Company and accept the offer of Mr. Sanders without incurring any liability for brokerage to the broker who represented the

> Newtown Creek Towing Company. This advice was given after reading our correspondence on the matter and detailed oral report of Mr. Allen and Mr. Lambrecht."

The entry of March 6th (R. 339) refers to a conversation which allegedly occurred with petitioner's then attorney, Mr. Ives, and is equally prejudicial on the issue as to petitioner's employment. It reads as follows:

> "I reiterated we had not engaged anybody to negotiate a sale of our stock of the Red Star and College Point companies, and that from the very beginning, I had so indicated to Mr. Waters, and that he represents the buyer and not the Trust Company *et al.* as agent, broker or otherwise."

The court below, in sustaining the admissibility of the record, placed it flatly on the ground that it was allowable under the Business Records Act, and that, in the court's opinion,

> "the business of a corporate trustee justified the establishment of a practice of keeping detailed records of day by day events affecting its trusts, and that records so made are made 'in the regular course of business'" (R. 356).

As pointed out in petitioner's brief, this diary was admittedly inaccurate (R. 157-159, 168) and incomplete (R. 157, 209, 232-233). The person who kept the record was not obliged, as part of his duties, to record everything that occurred in the handling of the estate's matters. According to Allen, it was obligatory only that "certain definite things" go in, "such as the submission of an accounting to the court, and an agreement from a co-trustee or any other beneficiary as to the sale or purchase of im-

portant security. Those things must go in. Then as to all of the other things, the man who is in charge of the account puts in those things which are important * * * but he boils down the important things. Some men are more careful than others * * *. It would be a man's discretion as to what he would write down * * * " (R. 232-233).

The Conflicting Decisions.

In view of these facts, and what was said about them in Point I of the petitioner's brief, there is marked agreement with petitioner's contentions in the two recent decisions already referred to; and by the same token, marked disagreement with the opinion of the court below. Thus, in *New York Life Insurance Co.* v. *Taylor,* 143 F. 2d 14, 17, it was held that a hospital record containing reports of conversations with the assured on a life insurance policy, and opinions of people treating him, were inadmissible under the statute, as interpreted by this court in *Palmer* v. *Hoffman,* 318 U. S. 109, Justice Arnold saying, at page 17:

> "A literal reading of the above statute would make the records in this case admissible on the theory that the business of operating a hospital requires records of the histories of patients, reports of unusual conduct and also diagnoses by physicians. But the Supreme Court, in *Palmer* v. *Hoffman,* has, we believe, limited the admission of records under the Federal Shop Book Rule statute to those which are trustworthy because they represent written reflections of day to day operations. The opinion in that case holds that the statute is not one 'which opens wide the door to avoidance of cross-examination'.
>
> "In this case the records are not offered to prove written facts such as the date of admission to the

hospital, the names of the attending physicians, etc. They are offered to prove the truth of accounts of events and of complicated medical and psychiatric diagnoses. The accuracy of such accounts is affected by bias, judgment and memory; they are not the written product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for 'payrolls, accounts receivable, accounts payable, bills of lading and the like'. The Supreme Court has stated that the test of admissibility must be the 'character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation'. *To admit a narrative report of an event, or a conversation, or a diagnosis, as a substitute for oral testimony, is to give any large organization the right to use self-serving statements without the important test of cross-examination.* Cross-examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor. We believe that *Palmer* v. *Hoffman* restricts the application of the Federal Shop Book Rule statute to that type of business entries." (Emphasis supplied.)

Chief Justice Groner concurred in this opinion, but Justice Egerton dissented, on the ground that in his opinion, the records were admissible under the statute.

In *Schmeller* v. *United States,* 143 F. 2d 544, the Sixth Circuit had before it the question as to the admissibility of a group of documents made in the regular course of business, some of which contained hearsay statements. The court said, per Allen, *J.*, at page 550:

"As to certain of these documents, we think that this admission *en masse* was error. The purpose

> of the enactment of section 695 was to eliminate the technical requirement of proving the authenticity of business records and memoranda by the testimony of the maker (*Landay* v. *United States*, 108 F. 2d 698, 705). *The mere fact that the paper offered in evidence is taken from a business file and is otherwise proved in compliance with §695 does not establish its competency.* It is questionable whether all the papers offered in evidence with this mass of exhibits were made as memoranda or records. It is also questionable whether all of the matters to which they related were relevant. *Section 695 in no way repealed the ordinary requirements of relevancy and competency.. The District Court should have examined and ruled upon each paper separately, and should have excluded the hearsay and other incompetent evidence.''* (Emphasis supplied.)

In the case at bar, although the question was fully argued below, to the effect that even if the record was admissible as such, the entries in question were irrelevant and incompetent, the court never discussed the question in its opinion, and it must be deemed to have been overruled. As was pointed out in petitioner's brief, even if Mr. Lambrecht had been interrogated as to the advice of counsel, any evidence on this subject would have been inadmissible as hearsay and highly irrelevant and prejudicial, for such advice is never a defense in a civil action, except where want of probable cause is an essential part of the cause of action; and even then it is only admissible when it is first proved, as it was not attempted to be proved here, that the advice was given after a full and fair statement of the facts (38 C. J. 427, *et seq.;* 18 R. C. L. 45, *et seq.; Lathrop* v. *Mathers,* 143 App. Div. 376, 380).

It was argued in the respondent's brief that Lambrecht was examined as a witness, and could therefore have been

cross-examined as to these entries. Even if true, that is not an answer to the objection that the entries themselves were hearsay, irrelevant and incompetent. Otherwise, all hearsay evidence is admissible, merely because the witness testifying to it can be cross-examined as to what he heard. Nor is it true that Lambrecht could have been cross-examined as to the advice of counsel, who themselves were not produced as witnesses. Moreover, it is of course the law that witnesses cannot corroborate their own testimony by self-serving documents, prepared by themselves. If they can, then the door is open to the use of such documents in any case, and the witness with the most plausibly written memorandum in support of his testimony will be the one entitled to the greatest belief.

The decision of the court below, without any basis in the record, has held that the business of a corporate trustee justifies the establishment of the practice of keeping such a diary. As already stated, the only evidence in the record is to the effect that only certain essential matters were required to be kept in record form, and the rest—the decision as to what was important enough to put in and how to boil it down—was left wholly to the discretion of the man in charge. Yet the matters here in question were none of them of the essential character which required a record to be kept. They were matters left to the discretion of the entrant, and as stated by Justice Arnold in the *New York Life Insurance Co.* case, they were a mere "narrative report of an event", whose admission gives to "any large organization the right to use self-serving statements without the important test of cross-examination." As also stated by Judge Arnold, in the same opinion, "The accuracy of such accounts is affected by bias, judgment and memory."

The entries in the case at bar were made by the very two men charged with responsibility in the transaction, who were admittedly anxious to sell to the ultimate customer,

Sanders, rather than to the petitioner's customer, and heavily charged with bias.

In answer to the petition, the respondent reiterated the argument that the door had been opened to the use of Exhibit A by petitioner's placing in evidence Exhibit 12; but the Circuit Court deliberately refrained from ruling on this question, because it held that it was "disposed to agree with the ruling that it was admissible under the statute" (R. 356). However, the contention is without merit, because Exhibit 12 is not even a part of Exhibit A, but an entirely separate and distinct paper (R. 295), and was only printed as part of Exhibit A because a copy thereof, with marginal notes, was kept in the file with the rest of the papers making up Exhibit A (R. 326-327), which was not offered or received as explaining Exhibit 12 (R. 146), and could not possibly have served that purpose, particularly when it is borne in mind that Exhibit 12 is dated February 18th, and the entries to which particular objection was made are dated March 5th and March 6th, and further, they relate to entirely different subjects. If it had been offered to explain Exhibit 12, then the court could only have admitted that part which was explanatory, and that only for the purpose of construing Exhibit 12; not as independent evidence (*People* v. *Schlessel*, 196 N. Y. 476, 481; 7 Wigmore, *Evidence*, §2113).

Conclusion.

The question sought to be reviewed is one of the highest public importance. There seems to be a great differerence of opinion as to what this court meant in interpreting the Federal Shop Book Statute in the case of *Palmer* v. *Hoffman*. It is a question of almost daily recurrence in the trial of lawsuits, and a question that should be settled once and for all. It seems, in the case at bar,

as if great injustice has been done to the petitioner by the admission of a record which he had every right to believe was a self-serving document, containing hearsay, irrelevant and incompetent entries, which plainly affected the very issue which the jury was asked to pass upon, namely, that of the plaintiff's employment.

The decision of the court below, without any basis therefor in the record, discriminates in favor of corporate trustees, and gives them the right, denied to other litigants, to prepare a narrative record of events and transactions, leaning definitely in their own favor, after litigation has become imminent, and to introduce such record in evidence in defense of the position which they seek to bolster.

In view of the conflicting opinions which now appear to be held by the Circuit Court of Appeals of the Sixth Circuit, and by the Court of Appeals for the District of Columbia, the present seems a proper occasion for the granting of an application for rehearing.

WHEREFORE petitioner prays that a rehearing be granted; that the order denying the original petition be vacated, and that the writ issue as heretofore prayed.

Dated, New York, November 30th, 1944.

Respectfully submitted,

SIDNEY S. BOBBÉ
Attorney for Petitioner.

I hereby certify that this petition for rehearing is presented in good faith, and not for delay.

SIDNEY S. BOBBÉ,
Attorney for Petitioner.